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No. 92-420

In the Supreme Court of the United States

OCTOBER TERM, 1992

RIVERBEND FARMS, INC., ET AL., PETITIONERS

v.

EDWARD R. MADIGAN,
SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly applied the "harmless error" rule codified in the Administrative Procedure Act, 5 U.S.C. 706, in holding that the Secretary of Agriculture's failure to publish notice of weekly marketing order meetings in the *Federal Register* and to permit written comments at such meetings was harmless error where petitioners had actual prior notice of such meetings and the opportunity to comment.

2. Whether the court of appeals properly executed its responsibility to perform judicial review of agency action in holding that the Secretary's regulations were otherwise proper under the Administrative Procedure Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 958 F.2d 1479. The initial opinion of the district court (Pet. App. 22a-33a) and the opinion on the government's motion for reconsideration (Pet. App. 19a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1992. A petition for rehearing and suggestion for rehearing en banc was denied on June 9, 1992. Pet. App. 17a-18a. The petition for a writ of certiorari was filed on September 8, 1992. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent portions of the Administrative Procedure Act, 5 U.S.C. 553, 706, are set forth at Pet. App. 34a-36a. Pertinent portions of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, are set forth at Pet. App. 36a-40a. Marketing Order 907, 7 C.F.R. Pt. 907, regulating the marketing of navel oranges in Arizona and California, is set forth at Pet. App. 40a-49a.

STATEMENT

1. The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, (the AMAA or the Act), authorizes the Secretary of Agriculture (the Secretary) to issue marketing orders regulating the quantities of agricultural commodities shipped into markets identified by the Secretary, in order to protect prices for the producers and to maintain orderly market conditions. 7 U.S.C. 602(1), 608c(6)(C). In 1954, the Secretary promulgated regulations governing the shipment of navel oranges from California and Arizona, Marketing Order 907, 7 C.F.R. Pt. 907; see 18 Fed. Reg. 4708-4720 (1953), which are still largely in effect. The Marketing Order divides California and Arizona into four districts, 7 C.F.R. 907.66, and authorizes the Secretary to limit the number of navel oranges shipped from these districts during the navel orange marketing season, 7 C.F.R. 907.67, which runs from mid-autumn through mid-spring. The Marketing Order provides for weekly volume limitations on shipments, 18 Fed. Reg. 4710, 4715 (1953), whenever the Secretary finds that this "will tend to effectuate the declared policy of the act." 7 C.F.R. 907.52.

The Navel Orange Administrative Committee (the NOAC), established by regulation, is composed of growers, handlers, and marketers of navel oranges. 7 C.F.R. 907.20. Before the start of each season, the NOAC notifies all handlers by letter, and places newspaper advertisements as well, before holding a public meeting concerning its proposed annual Marketing Policy, which estimates the weekly volume restrictions that will be necessary in the upcoming season. The final version of the Policy is sent to the Secretary, who analyzes those recommendations in creating his own Position Paper, indicating whether he intends to impose volume restrictions and, if imposed, what he anticipates they will be. Pet. App. 3a.

During the marketing season, the NOAC holds open meetings each Tuesday at which market conditions, growing conditions, and the appropriate volume regulations for the coming week are considered. The NOAC then sends the Secretary a recommendation on the volume of oranges that should be authorized for shipment during the following week. The NOAC's recommendation, along with information generated by United States Department of Agriculture (USDA) personnel in California and Washington, D.C., is analyzed by USDA and a decision is made whether and at what level to impose volume restrictions for the coming week. Pet. App. 3a-4a; Sec. Dec. at 73-76, 244-245.

If a decision is made to impose such restrictions, USDA publishes a regulation in the *Federal Register* on Friday, which includes a statement explaining that, because volume regulations are imposed weekly on the basis of current data, USDA did not engage in notice and comment rulemaking, because it would be impracticable to do so. See Sec. Dec. at 100, 182-183.

2. Petitioners are handlers of navel oranges. In 1980, they filed an administrative action under 7 U.S.C. 608c(15)(A), complaining, in part, that the Secretary failed to follow notice and comment rulemaking procedures under the Administrative Procedure Act (APA), 5 U.S.C. 553, in issuing the weekly volume restriction regulations and annual position paper. Petitioners also claimed that the Secretary failed to engage in reasoned decision-making, see 5 U.S.C. 706, because of the USDA's reliance on the recommendations of the NAOC in carrying out the agency's functions under the AMAA.[1] These claims were first considered by a USDA administrative law judge who ruled in petitioners' favor on two issues related to the matter of the legality of the weekly volume regulation procedure, and in the government's favor on all the remaining issues. Both sides appealed the ALJ's decision to the Judicial Officer, the Secretary's designee for deciding such matters, who reversed the ALJ's decision in favor of plaintiffs and ruled in the government's favor on all the issues before him. See R.E. Vol. 1.

3. Petitioners then brought suit in the United States District Court for the Eastern District of California on February 18, 1988, seeking judicial review of the Secretary's decision under 7 U.S.C. 608c(15)(B).[2] On cross-motions for summary judg-

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[1] Petitioners also complained that they had been treated unfairly compared with handlers in another district, because they were subject to volume restrictions when such restrictions had been suspended for oranges grown in the other district.

[2] The AMAA, 7 U.S.C. 608c(15)(B), permits judicial review of any orders of the Secretary in administrative proceedings brought by the handler under 7 U.S.C. 608c(15)(A).

ment, the district court granted judgment in favor of the Secretary on every issue but one—the court agreed with petitioners that the promulgation of weekly volume regulations without engaging in notice and comment violates the informal rulemaking provisions of the APA. See 5 U.S.C. 553. The Secretary appealed and petitioners cross-appealed.

4. The United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. The court first held that it and the petitioners were bound by the Secretary's decision, first made in 1954 with the promulgation of the Marketing Order, that "volume restrictions must be issued on a weekly basis," Pet. App. 6a, and also agreed that the need to have weekly regulations furnished the necessary "good cause for making the weekly restriction effective upon publication in the *Federal Register*." *Id.* at 9a.

However, while noting that the procedures under the Secretary's system—giving interested parties the opportunity to comment at the NOAC mettings, with their input considered by the NOAC in its weekly recommendations to the Secretary—"do not, in fact, depart radically from those contemplated by the APA," Pet. App. 7a, the court noted that the Secretary's procedures did not provide for public notice in the *Federal Register* and that the notice that was accorded did not provide a proposed rule. Pet. App. 9a. The court held that the Secretary should henceforth "publish a notice in the *Federal Register* a few days before the NOAC meeting, advising the public of the time and place of the meeting, the legal authority for the proposed volume restrictions and the proposed volume restrictions," Pet. App. 9a-10a, and should permit the submission of written comments

before promulgating weekly volume restrictions, *id.* at 10a. The court remanded the case for the Secretary to comply.

Having found that the Secretary had not shown good cause for forgoing APA procedures for notice and comment, the court proceeded to take "due account * * * of the rule of prejudicial error." 5 U.S.C. 706. Noting that this "harmless error rule" must be applied with "great caution," the court opined that "the failure to provide notice and comment is harmless only where the agency's mistake 'clearly had no bearing on the procedure used or the substance of decision reached.' " Pet. App. 11a (quoting *Sagebrush Rebellion, Inc.* v. *Hodel*, 790 F.2d 760, 764-765 (9th Cir. 1986)). Applying that test for harmless error, the court found that the Secretary's failure to employ APA notice and comment procedures was harmless error on the particular facts of this case. The court noted that all the parties knew the ground rules:

> that there would be an annual position paper setting proposed weekly volume restrictions; that the NOAC would meet every Tuesday during the season; that the starting point for debate at those Tuesday meetings would be the figure listed for that week in the annual position paper (or in the NOAC's updated versions of it); that there would be opportunity for public comment at the Tuesday meetings; and that the final volume restrictions would be issued by the Secretary soon afterwards.

Pet. App. 13a. The court concluded that, in these circumstances, "[i]f the procedural error here is not harmless, it's hard to imagine a case where it would be." *Ibid.*

The court of appeals went on to reject petitioners' contention that the Secretary's weekly rules lacked "reasoned decision-making" because of the Secretary's reliance on the recommendations of the NOAC in issuing each week's rule, stating that "the Secretary is free to seek advice from whatever sources he deems appropriate, so long as he or his delegate in the Department retains ultimate authority to issue the regulation." Pet. App. 14a (citing *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 399 (1940)). Concluding that the record "makes it clear that the Secretary does not rubber stamp the NOAC's recommendations" and "retains the authority to depart from or ignore them altogether," Pet. App. 14a, the court found no difficulty with the Secretary's utilization of the NOAC's recommendations.[3]

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or with that of any other court of appeals. The issues raised by petitioners are fact-specific and were properly resolved by the court of appeals. Further review is thus unwarranted.

1. Petitioners' principal argument is that the court of appeals ered in applying the "harmless error" rule of the APA, under which a reviewing court must take "due account * * * of the rule of prejudicial error." 5 U.S.C. 706. This contention is baseless.

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[3] The court also rejected petitioners' contention that the Secretary's method of allocating volume restrictions among districts subject to Marketing Order 907 violated the AMAA's "uniform rule" requirement imposed by 7 U.S.C. 608c(6)(C). Pet. App. 14a-15a. Petitioners do not challenge this ruling.

a. Petitioners first argue that the harmless error rule cannot be applied in this case because no rule can have the force of law unless it was promulgated in accordance with the procedures mandated by the APA. Pet. 6-9. This amounts to nothing less than asking this Court to read the harmless error rule out of the statute, a request for which petitioners cite no authority and for which we have found none.

The APA provides broadly that "[i]n making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. 706. The "foregoing determinations" include the power of a reviewing court to set aside agency action taken "without observance of procedure required by law." 5 U.S.C. 706(2)(D). Thus, a reviewing court must look to see if the agency complied with the procedural requirements of the APA; if it did not, the court must then determine whether its error produced prejudice.[4] If no prejudice resulted from the error, the rule is still valid under the APA. And this is precisely what occurred in this case: the court of appeals reviewed agency action,

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[4] Petitioners incorrectly assert that this Court's decision in *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), "implicitly rejected a 'no prejudicial error' defense." Pet. 8. *Bowen* did not address the defense for the simple reason that the agency in that case made no attempt to assert the defense. Rather, the sole issue there was whether the agency acted properly in applying retroactively a new rule that replaced an earlier rule that had been set aside for procedural failure. A holding that an agency may not make a new rule retroactive does not address, by implication or otherwise, whether the original rule could have been sustained because the procedural error was "harmless." Indeed, elsewhere in their petition, petitioners acknowledge that this Court has never addressed the issue. See Pet. 6.

which the court found had been taken "without observance of procedure" required by the APA and, applying "the rule of prejudicial error," found that the agency's failure to follow such procedure was not prejudicial.

Petitioners' argument is also contrary to numerous holdings of the courts of appeals which have routinely applied the harmless error rule to find that agency rulemaking produced no prejudice where the interested parties had actual notice, as they did here. See, *e.g.*, *Shelton* v. *Marsh*, 902 F.2d 1201, 1206 (6th Cir. 1990) ("cases specifically exploring the effect of failure to follow notice procedures have held that the [harmless error] doctrine applies where there is sufficient actual notice"); *Sagebrush Rebellion, Inc.* v. *Hodel*, 790 F.2d at 764 (failure to adhere to notice and comment procedures required by statute was not prejudicial under Section 706 because actual notice had been afforded and "the purposes of [the statute's] notice requirement were fully satisfied"); *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) ("even if the agency has not given notice in the statutorily prescribed fashion, actual notice will render the error harmless"); *Sierra Club* v. *Costle*, 657 F.2d 298, 355 (D.C. Cir. 1981) (same). Petitioners have cited no case [5] accepting their naked assertion that the harmless error rule does not apply to agency rulemaking.[6]

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[5] Petitioners cite a number of cases that have invalidated administrative rules without undertaking a harmless error analysis. Pet. 22 n.27. But the fact that some courts may have seen fit to dispense with such an analysis—without comment—does not alter the statutory command that "due account shall be taken of the rule of prejudicial error."

[6] Petitioners claim that their interpretation does not read the harmless error rule out of the statute, Pet. 9 n.6, but in

b. Petitioners next contend that the court of appeals erred in applying the harmless error rule to the facts of this particular case. Pet. 12. But whether the acknowledged error by the Secretary in failing to follow the notice and comment requirements of the APA was, in fact, prejudicial to petitioners is necessarily a fact-bound and case-specific issue. There is nothing unique or significant about this case that would warrant plenary review of the court's application of the harmless error rule.

Petitioners first attack the wisdom of marketing orders in general and Marketing Order 907 in particular, Pet. 10-20, and assert that the system created by the AMAA and its use of committees such as the NOAC does not permit full participation by handlers, such as petitioners, who were opposed to volume restrictions. Pet. 18-19 & nn.23-25. True or not, the wisdom of the Marketing Order was not before the court of appeals and is not before this Court. See *Pescosolido* v. *Block*, 765 F.2d 827, 830 (9th Cir. 1985). The merit of marketing orders is irrelevant to the question of the proper application of the harmless error rule on the particular facts presented.

Also irrelevant is petitioners' assertion that the notice and opportunity for comment afforded by the NOAC meetings were inadequate substitutes for APA notice and comment. Pet. 14-15, 18-19. The question

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that footnote they defeat their own argument, for they concede that the harmless error rule does apply where noncompliance was "mere[ly] technical" and the "purposes of § 553 were met through other means." That is precisely what the court of appeals found here: the petitioners had adequate notice and opportunity for comment, although the Secretary's rulemaking procedures were not in strict compliance with the APA.

is not whether the Secretary erred in failing to follow APA procedures—the court of appeals has already held that he did. Rather, the question is whether petitioners were *prejudiced* by this acknowledged failure to follow those procedures. And that question is necessarily fact-bound. Cf. *Alcaraz* v. *Block*, 746 F.2d 593, 612 (9th Cir. 1984) ("inquiry into whether the Secretary properly invoked 'good cause' proceeds case-by-case, sensitive to the totality of the factors at play").

In this respect, the record makes clear, and petitioners do not dispute, that petitioners had actual notice of the NOAC meetings and attended many of them. Pet. 15. Thus, contrary to petitioners' assertions, Pet. 21-24, the court of appeals did not hold that petitioners must show that they were prejudiced by the failure to follow APA procedures. Rather, the court merely held that the record in this case showed that these petitioners were, in fact, not prejudiced because they received actual notice and an opportunity for comment under the Secretary's procedures. As the court of appeals recognized, this actual notice makes the harmless error rule applicable. See, *e.g.*, *Shelton*, 902 F.2d at 1206 ("the [harmless error] doctrine applies where there is sufficient actual notice"); *Washington State Farm Bureau* v. *Marshall*, 625 F.2d 296, 306-307 (9th Cir. 1980) (noting that informal communications provided notice even in the absence of formal notice and comment procedures).[7]

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[7] Petitioners claim that this decision "creates a split" with *Walter Holm & Co.* v. *Hardin*, 449 F.2d 1009 (D.C. Cir. 1971), which required, according to petitioners, "comments to and consideration and decision by the Secretary, not the industry's administrative committee." Pet. 15-16. No such conflict exists. In *Holm*, a committee of tomato handlers, like the NOAC

Petitioners err in stating that "[t]here is no evidence in the record that the shippers knew about USDA's pre-season approval process, and of course none that they were allowed to participate in that process * * *." Pet. 14. In fact, the NOAC's annual marketing policy—upon which the Secretary relies heavily during the development of his annual position papers, A.R. Tab 149, at 1924, 1926-1928, 1942, Exhs. 694-701; Sec. Dec. at 73-76—is the product of public meetings for which each petitioner received actual and personal notification. A.R. Tab 149, at 1077-1080, 1961. Likewise, the weekly volume regulations result from recommendations made by the NOAC as a result of open meetings attended by growers, handlers and other interested parties, including the petitioners in this case. *Id.* at 1018-1019. Thus, "[e]ven if the Department were required first to publish a notice of proposed rulemaking, there would be no practical increase in the opportunity for public input since the Committee's meeting process already allows for unlimited public input." Cioffi Aff. at ¶ 4; Supp. R.E. at 37.

c. Petitioners suggest that the decision of the court of appeals in applying the harmless error rule conflicts with *Shell Oil Co.* v. *EPA*, 950 F.2d 741 (D.C. Cir. 1991); *McLouth Steel Prods. Corp.* v.

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in this case, made recommendations to the Secretary. The court simply required that the interested parties be able to make "oral presentation[s] to Department officials" before rulemaking; it did not require a hearing before the Secretary himself. 449 F.2d at 1016. In this case, the Secretary's representatives attended all the NOAC meetings, and comments made in the NOAC meetings were forwarded by those representatives to the agency decision-makers who made the final decision. See Sec. Dec. at 243-246.

Thomas, 838 F.2d 1317 (D.C. Cir. 1988); *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506 (D.C. Cir. 1983); *Sharon Steel Corp.* v. *EPA*, 597 F.2d 377 (3d Cir. 1979); and *United States Steel Corp.* v. *EPA*, 595 F.2d 207 (5th Cir. 1979). Pet. 21-24. Petitioners claim that these courts have rejected the applicability of the harmless error rule in cases "such as the present case where the agency completely failed to engage in public participation." Pet. 21. But none of these cases purports to hold that the harmless error rule does not apply where the party had *actual* notice of the proposed rule, the situation presented here.

2. Petitioners' final contention is that the lower courts inadequately examined the claim that the Secretary failed to engage in "reasoned decision-making" under 5 U.S.C. 706(2)(A), because of the Secretary's reliance on the NOAC recommendations. Petitioners claim no inter-circuit conflict or conflict with any decision of this Court with respect to this issue. Rather, petitioners assert only that the district court and the court of appeals "have so far departed from their judicial review responsibilities that this Court should exercise its supervisory power and summarily reverse this case and remand it for further proceedings." Pet. 24. This argument is frivolous.

There is nothing remotely improper about the Secretary's generally following the recommendations of the NOAC, particularly with respect to the Secretary's non-binding estimation as to whether volume restrictions might be necessary in the upcoming season. As the Secretary noted in his decision, the whole structure of the Act evidences Congress's intention that the Secretary rely heavily on committees of producers and handlers. The theory is that such reliance

will result in "the most sound decisions" because the handlers and producers serving on such committees have the greatest knowledge of market conditions. *Chiglades Farm, Ltd.* v. *Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973), cert. denied, 417 U.S. 968 (1974).

Similarly fallacious is petitioners' reliance on the testimony of "senior USDA officials," Pet. 26, in support of their assertion that the NOAC recommendations were "rubber stamped" by the Secretary. As the Secretary noted, these individuals did not determine the content of the position papers. Indeed, the "only witness" in the USDA who was knowledgeable concerning these weekly regulations was Ronald L. Cioffi, then Chief of the Marketing Agreements Section, Fruit Branch, Fruit and Vegetable Division of the Agricultural Marketing Service. Sec. Dec. at 239. Mr. Cioffi testified at length concerning the in-depth review given the NOAC recommendations, explaining the process and making clear the independence exercised by the USDA in issuing the weekly rules. *Id.* at 240. The Secretary found that the record showed "at least seven examples over a period of 4 years * * * where the NOAC recommended volume limitations for a particular week, but the Division Director refused to promulgate volume limitations," finding that this evidence "demonstrates that the Department independently evaluated NOAC's recommendations, and exercised [its] authority, when it felt it necessary, to differ with NOAC's recommendations." *Id.* at 241. As both the district court and the court of appeals held, these findings are fully sufficient to sustain the weekly regulations against petitioners' attack. See Pet. App. 14a, 32a-33a.

Moreover, the record demonstrates that most of the decisions of the NOAC were unanimous or near-

unanimous. Sec. Dec. at 242. In cases where there were dissenting views, the Secretary found that such views were conveyed to the Secretary's representatives in a number of ways, such as inclusion in the weekly impact statement and in telecopier wires sent by the Secretary's marketing field office representative. *Id.* at 243-246. The Secretary thus found that petitioners had failed to carry their burden of proof that the Agency's Division Director did not have sufficient information before him to make the necessary decisions on an informed basis. *Id.* at 246. All of these findings are completely ignored by petitioners.

Petitioners make a final argument that the court of appeals' decision, although it corrects the Secretary's errors prospectively, leaves petitioners without any remedy for the harm they have suffered. Pet. 28-29. This is of course because—as the court found—they were not prejudiced by the Secretary's admittedly incorrect procedures. They suffered no harm; they need no remedy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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